Lim Geak Liang v East West UMI Insurance Bhd

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 04-7 OF 1994
MOHD AZMI, MOHAMED DZAIDDIN FCJJ AND ABU MANSOR JCA
8 SEPTEMBER 1997

Civil Procedure *— Appeal — New points, introduction of — Point not pleaded or argued in court below — Construction of clause in insurance contract — Discretion of appellate court to consider new point in the interests of justice*

Civil Procedure *— Appeal — Interference by appellate court — Question of law dependent on finding of fact — Issue not raised in court below — No finding of fact made by trial judge — Whether appellate court would interfere with judgment of court below*

The plaintiff took a policy of insurance ('the policy') from the defendant. During the currency of the policy, he accidentally chopped off his left thumb. The plaintiff later gave notice of the accident and submitted his claim for compensation for permanent disablement which the defendant refused to pay on the grounds, inter alia, that he was in breach of condition 4 of the policy when he failed to inform the defendant that during the currency of the policy, another policy had been issued to him by another insurance company. The plaintiff had become a member of a discount card scheme and had been insured under the Group Personal Policies. In the sessions court, the plaintiff contended that he was not required under condition 4 to disclose any other insurance effected against accident where such insurance was effected after or during the policy with the defendant. The sessions court judge rejected the plaintiff's claim and the High Court affirmed the decision. The plaintiff appealed to the Federal Court on the ground that by virtue of the words 'excluding coupon' appearing in condition 4, the High Court judge had erred in finding that the plaintiff should have notified the defendant of the insurance coverage under the Group Personal Policies. Counsel for the defendant objected to this new issue which was never pleaded and argued in the courts below.

Held, dismissing the appeal:

(1) The plaintiff should be allowed to proceed with the appeal since the ground of appeal concerned the construction of condition 4 of the policy. While a point which was not raised at the trial and which was raised for the first time in the appellate court must always be closely scrutinized, the question of whether effect should be given to such a point was one for discretion. When a question of law was raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it was not only competent but expedient, in the interests of justice, to entertain the plea (see p 522A–D); *Gulwant Singh v Abdul Khalik* [1965] 2 MLJ 55 followed.

(2) In this case, whether or not the plaintiff's second policy came under the exclusion clause must necessarily depend on the facts.

The evidential burden was on the plaintiff to bring himself within the exception. This could only be resolved by the court below after hearing the evidence adduced by the plaintiff. On general principles, where a decision on a question of law was dependent upon a finding of fact which was not made by a judge or jury because the question was not raised or put at the trial or where the question of law could not be resolved without further evidence not available on the record, an appellate court would not interfere with the judgment or verdict of the lower court. From the notes of proceedings in the courts below, the court was satisfied that the issue of coupon insurance was never raised by the plaintiff's former counsel. There were no facts upon which the court could decide whether the insurance policy issued to the plaintiff by virtue of his being a member of the discount card scheme was coupon insurance (see p 523B–H); *Yong Mok Hin v United Malay States Sugar Industries Ltd* [1967] 2 MLJ 9, *A-G v Pang Ah Yew* [1934] MLJ 184 and *Banbury v Bank of Montreal* [1918] AC 626 followed.

[Bahasa Malaysia summary

Plaintif telah membeli suatu polisi insurans ('polisi tersebut') daripada defendan. Semasa polisi tersebut berkuatkuasa, beliau dengan tidak sengaja telah memotong ibu jari kirinya. Plaintif kemudiannya memberi notis tentang kemalangan dan menyerah tuntutannya untuk pampasan atas kecacatan tetap yang defendan enggan bayar atas alasan, antara lain, bahawa plaintif telah memungkir syarat keempat polisi tersebut apabila beliau gagal memaklumkan kepada defendan bahawa semasa polisi tersebut berkuatkuasa, satu lagi polisi telah dikeluarkan kepadanya oleh syarikat insurans yang lain. Plaintif telah menjadi seorang ahli skim kad diskaun dan telah diinsuranskan di bawah Polisi Peribadi Kumpulan. Di mahkamah sesyen, plaintif menghujahkan bahawa beliau tidak dikehendaki di bawah syarat keempat untuk mendedahkan mana-mana insurans lain yang diambil terhadap kemalangan di mana insurans itu diambil sebelum atau semasa mempunyai polisi dengan defendan. Hakim mahkamah sesyen menolak tuntutan plaintif dan Mahkamah Tinggi mengesahkan keputusan itu. Plaintif merayu kepada Mahkamah Persekutuan atas alasan bahawa disebabkan perkataan-perkataan 'kupon yang tidak termasuk' yang menonjol dalam syarat keempat, hakim Mahkamah Tinggi terkhilaf dalam membuat keputusan bahawa plaintif seharusnya memaklumkan kepada defendan tentang perlindungan insurans di bawah Polisi Peribadi Kumpulan. Peguam defendan membantah terhadap isu baru ini yang tidak pernah diakui dan dihujahkan di mahkamah bawah.

Diputuskan, menolak rayuan:

(1) Plaintif patut dibenarkan meneruskan rayuan memandangkan alasan rayuan adalah berkaitan dengan tafsiran syarat keempat polisi tersebut. Manakala suatu hujah yang tidak dibangkitkan di

perbicaraan dan yang dibangkitkan buat kali pertama di mahkamah rayuan mestilah sentiasa diteliti, persoalan tentang sama ada kesan patut diberikan kepada hujah demikian adalah satu hujah budi bicara. Apabila suatu persoalan undang-undang dibangkitkan untuk kali pertama di mahkamah terakhir, atas tafsiran suatu dokumen, atau atas fakta-fakta yang diakui atau dibuktikan melampaui kontroversi, ia bukan sahaja kompeten tetapi wajar dalam kepentingan keadilan untuk melayan rayuan itu (lihat ms 522A–D); *Gulwant Singh v Abdul Khalik* [1965] 2 MLJ 55 diikut.

(2) Dalam kes ini, sama ada polisi kedua plaintif dirangkumi oleh fasal ketakmasukan atau tidak mestilah bergantung kepada fakta-fakta. Beban membukti terletak pada plaintif untuk membawa dirinya dalam kekecualian tersebut. Ini hanya boleh diselesaikan oleh mahkamah bawah selepas mendengar keterangan yang dikemukakan oleh plaintif. Atas prinsip am, di mana satu keputusan atas persoalan undang-undang bergantung kepada pendapat fakta yang tidak dibuat oleh hakim atau juri kerana persoalan itu tidak dibangkitkan atau dibicarakan atau di mana persoalan undang-undang tidak boleh diselesaikan tanpa keterangan lanjut yang tidak didapati di rekod, sesebuah mahkamah rayuan tidak akan mengganggu penghakiman atau keputusan mahkamah rendah. Dari nota-nota prosiding di mahkamah bawah, mahkamah berpuas hati bahawa isu insurans kupon tidak pernah dibangkitkan oleh bekas peguam plaintif. Tiada fakta-fakta yang boleh dirujuk oleh mahkamah bagi membuat keputusan sama ada polisi insurans yang dikeluarkan kepada plaintif disebabkan beliau adalah ahli skim kad diskaun merupakan insurans kupon (lihat ms 523B–H); *Yong Mok Hin v United Malay States Sugar Industries Ltd* [1967] 2 MLJ 9, *A-G v Pang Ah Yew* [1934] MLJ 184 dan *Banbury v Bank of Montreal* [1918] AC 626 diikut.]

Notes

For cases on interference by appellate court, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 465–469.

For cases on introduction of new points, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 526–565.

Cases referred to

A-G v Pang Ah Yew [1934] MLJ 184 (folld)
Ajit Pd v Nandini AIR 1975 Orissa 184 (refd)
Banbury v Bank of Montreal [1918] AC 626 (folld)
Gulwant Singh v Abdul Khalik [1965] 2 MLJ 55 (folld)
Tasmania, The (1890) 15 App Cas 223 (refd)
Yong Mok Hin v United Malay States Sugar Industries Ltd [1967] 2 MLJ 9 (folld)

Appeal from: Civil Appeal No 12–53–90 (High Court, Alor Setar)

RJ Manecksha (*Ranjit Singh* with him) (*Jagjit Singh & Co*) for the appellant. A

Renu Zechariah (*Anad & Associates*) for the respondent.

Mohamed Dzaiddin FCJ (delivering the judgment of the court): This is an appeal from the judgment of KC Vohrah J given on 16 December 1993 dismissing an appeal against the decision of the Sessions Court, Alor Setar dismissing the plaintiff's claim of RM50,000 for permanent disability suffered by him under a personal accident policy of insurance ('the policy') issued to him by the defendant, East West UMI Insurance Bhd. B

The facts of the case were these. The plaintiff took a policy of insurance from the defendant on 20 May 1986 insuring himself against personal injury or death for the period of 14 May 1986 to 14 May 1987. During the currency of the policy, ie on 23 January 1987, while cutting coconut, he accidentally chopped his left thumb. Under the policy he was entitled to be paid compensation in the sum of RM50,000 for permanent disablement. He gave notice of the accident and submitted his claim which the defendant company refused to pay him on two grounds, the relevant ground in this appeal being that he was in breach of condition 4 of the policy when he failed to inform the defendant that during the currency of the policy, another policy had been issued to him by Royal Insurance (M) Sdn Bhd for RM100,000. C D

The plaintiff filed an action against the defendant in the Sessions Court, Alor Setar on 13 December 1988 claiming for RM50,000 under the policy with interest and costs. The defendant denied liability and pleaded in the defence that by condition 4, the plaintiff was required to notify the defendant of his contracting or effecting any policy with other insurance companies. He failed to do so. Hence, the plaintiff was in breach of condition 4. In reply, the plaintiff contended that he was not required under condition 4 to disclose any other insurance effected against accident where such insurance was effected after or during the policy with the defendant. Further, and in the alternative, he contended that condition 4 was vague and ambiguous. After hearing the evidence, her Honour found as a fact that the plaintiff had accidentally cut off his left thumb. She also held that the plaintiff had breached condition 4 of the policy as he had failed to disclose the existence of the Royal Insurance policy at the material time. She found no ambiguity in the language of condition 4 and ruled against the plaintiff. The defendant was therefore entitled to avoid liability. E F G

The learned High Court judge agreed with her Honour's interpretation of condition 4. In his grounds of judgment, his Lordship dealt with condition 4 of the policy on the basis of what had been pleaded in the defence and reply and the arguments in the sessions court. At p 45 of appeal record, he had this to say: H

It is necessary to set out Condition 4 of the policy which reads: I

> 'The Insured shall give immediate notice to the company of any changes of address occupation pursuits or any injury, disease, physical defect or infirmity by the Insured has become affected and also notice of any other Insurance (excepting coupon or in connection with a Motor Insurance Policy) effected against accident or incapacity.'

A The plaintiff had become a member of the 'Eagle Card' scheme. 'Eagle Card' is a discount card. In consideration of his becoming a member of the scheme, he was assured under the Group Personal Policies with American International Assurance Co Ltd from 6 January 1986 to 5 January 1987 for RM100,000. The defendant company complained that the plaintiff did not inform the defendant of the insurance with the Royal Insurance (M) Sdn B Bhd.

The plaintiff contended that he was not required to give notice of any other policy of insurance effected against accident where such policy was effected after or during the policy issued by the defendant. Alternatively it was averred that condition 4 was vague and ambiguous.

C The learned judge found no ambiguity in the language of condition 4 and ruled against the plaintiff. I agree with her interpretation of condition 4 that the plaintiff was required to give notice to the defendant of the policy issued by Royal Insurance (M) Sdn Bhd.

His Lordship continued (at p 47):

D Counsel for the plaintiff also argued the condition 4 was not a condition precedent to liability on the part of the defendant but the short answer to this is that the second opening clause in the policy issued by the defendant company states that if during the period of the policy of insurance 'the Insured shall sustain such bodily injury ... the company will subject to the terms provisos exclusion and conditions of and endorsed in this Policy (*which terms provisos exclusions and conditions shall* so far as their nature of E them respectively will permit *be deemed condition precedent to the right to recover under this Policy*) pay to the Insured ... the sum or sums specified in the Table of Benefit'. (Emphasis added.)

The plaintiff was fully aware of the policy of insurance issued to cover him by virtue of his being a member of the 'Eagle Card' scheme and the F defendant is entitled to rely on this clause to say that the plaintiff had not fulfilled his obligation to inform the defendant of the insurance policy issued by Royal Insurance (M) Sdn Bhd.

In the result the appeal must fail and I accordingly dismiss the appeal with costs.

G The plaintiff appealed against the above judgment on the following ground:

The learned judge erred in finding that the appellant should have notified the respondents of insurance coverage benefitting him by virtue of him being a member of 'Eagle Card' when such insurance was expressly excluded by condition 4 of the policy issued to him by the respondents in the words appearing therein '*excepting coupon*' which words signify the description of H such Group Personal Policies effecting coverage upon being assigned a discount card.

Clearly, the issue central to this appeal is whether the policy issued to the plaintiff by the Royal Insurance Company as an incentive for his becoming a member of Eagle Credit Card is a '*coupon*' within the meaning of the I exception clause on condition 4 of the policy so as to exempt the plaintiff from the obligation of giving notice to the defendant company.

It is worth noting that this issue was never pleaded and argued in the courts below. At the outset of the proceedings, Cik Zechariah, counsel for the defendant, seized the opportunity by raising an objection that it was not open to the plaintiff to argue on appeal a fresh point not litigated and

decided by the courts below. We overruled the objection upon the basis that since the ground of appeal concerned the construction of condition 4 of the policy, it is within our discretion to hear the arguments of the parties. For this conclusion, we are guided by the decision of the Federal Court in *Gulwant Singh v Abdul Khalik* [1965] 2 MLJ 55 (per Thomson LP at p 58):

> A point which is not raised at the trial and which is raised for the first time in the Court of Appeal must always be most jealously scrutinized (*The Tasmania* (1890) 15 App Cas 223 at p 225). The question of whether effect should be given to such a point is, however, one for discretion (see *Perkowski v Wellington Corp* [1959] AC 53 at p 69) and the principles on which that discretion may be exercised have been thus set out in the case of *Connecticut Fire Insurance Co v Kavanagh* [1892] AC 473 at p 480) (per Lord Watson):
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> > 'When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea.'

Although this fresh issue involves a question of law on the construction of the word 'coupon', in our view, there is a burden on the plaintiff to adduce evidence that the Royal Insurance Policy was a 'coupon' within the meaning of the exception provided in condition 4. *Sarkar on Evidence* (14th Ed, 1993) called this burden as 'the burden of proof as a matter of adducing evidence' (p 1338). 'The burden in the sense of adducing evidence shifts from time to time having regard to the evidence adduced or the presumption of fact or law raised in favour of one or the other' (*Ajit Pd v Nandini* AIR 1975 Orissa 184).

In his submission for the plaintiff, En Rumi Manecksha recounted that the plaintiff became a member of the 'Eagle Card' and one of the incentives was that he was given a free PA policy. He contended that the policy issued by Royal Insurance (M) Sdn Bd by virtue of his being the Eagle Card holder was coupon insurance within the meaning of the word 'coupon' under condition 4. He submitted that the defendant, in the course of their insurance business, knew what coupon insurance was. He then referred us to 25 *Halsbury's Laws of England* (4th Ed) pp 319–320 and *Ivamy's General Principles of Insurance Law* (4th Ed) pp 121–122 on general principles and nature of coupon insurance. He concluded that as the Royal Insurance policy was coupon insurance, the plaintiff was excluded by condition 4 from giving notice to the defendant of any other insurance effected against accident or incapacity during the currency of the policy.

In reply, Cik Zechariah submitted that there was no evidence that a PA policy issued to 'Eagle Card' holder was coupon insurance. This was a question of fact which could only be decided by the trial judge after hearing the evidence and examining the documents. As such, this court could not infer that the policy issued by Royal Insurance (M) Sdn Bhd to the plaintiff was coupon insurance which exempted him from giving notice to the defendant of any other insurance policy under condition 4. On the contrary, counsel submitted that upon the evidence before the trial court, the defendant had shown that the plaintiff was in breach of condition 4 in

failing to inform the defendant regarding the PA policy issued by Royal Insurance (M) Sdn Bhd.

In this particular case, whether or not the plaintiff's second policy comes under the exclusion clause must necessarily depend on the facts. The evidential burden is on the plaintiff to bring himself within the exception. This can only be resolved by the court below after hearing the evidence adduced by the plaintiff. In *Yong Mok Hin v United Malay States Sugar Industries Ltd* [1967] 2 MLJ 9 at p 16, the Federal Court adopted the observations of Reay J and Lord Finlay LC in *A-G v Pang Ah Yew* [1934] MLJ 184 at p 187 and *Banbury v Bank of Montreal* [1918] AC 626 respectively, that on general principles, where a decision on a question of law is dependent upon a finding of fact which was not made by a judge or jury because the question was not raised or put at the trial or where the question of law cannot be resolved without further evidence not available on the record, a court of appeal would not interfere with the judgment or verdict of the lower court.

From the notes of proceedings in the courts below, we are satisfied that the issue of coupon insurance was never raised by the plaintiff's former counsel. In fact, the argument of the plaintiff's counsel concerning condition 4 before the learned High Court judge was not on the meaning of 'excepting coupon', but that the said condition was not a condition precedent to liability on the part of the defendant. Nowhere was the question of coupon insurance argued before the judges below, because otherwise, something would have been said in their respective judgments. We also find no evidence upon which the plaintiff can bring himself within the exception of condition 4.

In *The Tasmania* (1890) 15 App Cas 223 (per the judgment of Lord Herschell), it was held that a Court of Appeal was competent to decide even a question of fact raised for the first time on appeal provided:

> If it is satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case, if the controversy had arisen at the trial; and next that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness box.

In the present case, there are absolutely no facts upon which this court can decide on the contention of the plaintiff that the PA insurance policy issued to him by Royal Insurance (M) Sdn Bhd by virtue of his being an 'Eagle Card' holder was coupon insurance.

For reasons we have stated above, we are not prepared to interfere with the concurrent finding of the courts below and would accordingly dismiss this appeal with costs. Deposit to be paid to the defendant to account of taxed costs.

Appeal dismissed.

Reported by Kevin Ooi